

Techniques for Effective Technical Testimony

By Hon. Mary L. Davidsen
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Office of Environmental Adjudication

March 30, 2005

Project Documentation, a consistent project process “do loop”

1. Clear, simple writing: one point per sentence, if possible
2. Give some reference to common meaning of technical terms and jargon
3. Objective, not subjective viewpoint as to how someone in your field would deal with the professional demands of the project
4. Detail methods, rationale. Answer (“5 W’s and an H”):
 - a. What
 - b. Why
 - c. Who
 - d. When
 - e. Where
 - f. How
5. Document references
6. Photos, printouts: no editorial comments, just objective facts. Date/direction orientation, size and other indicators of perspective are helpful.
7. Public vs. private
 - a. Attorney-client privilege, work product
 - b. Public record access
 - c. Deliberative process, internal conflicts
 - d. “Newspaper rule”
8. Review file before release, assistance with discovery process
9. PROOFREAD! Get another to read to confirm your meaning

Review

1. make sure file is complete and copies can be read clearly
2. make yourself a work list of questions, items needing to be clarified, researched
3. information provided in discovery process
4. inform your counsel of steps you took in review process.

Relationship with your legal representative; who is client?

1. Review the file before meeting with counsel
2. Find out case status, get answers to “5 W’s and an H”
3. Tell your counsel about the weaknesses and strengths of the case
4. Counsel’s roles: advocate, advisor, counselor, with a duty to the tribunal.
Opposing counsel: neither an enemy nor a student.
5. Establish rapport
 - a. Professional courtesy
 - b. Common goals, mutual education

Presenting Testimony

1. Forum:
 - a. Client or regulatory forums
 - b. Prehearing: settlement conference, deposition, mediation/arbitration
 - c. Evidentiary hearing
 - i. Administrative agency
 - ii. Bench trial
 - iii. Jury trial
 - d. your deliberations with your attorney
 - i. information shared by you or your attorney with others
 - ii. expert testimony (Ind. Trial Rule 26(a)(2)(B), an expert witness statement prepared and signed by the witness, containing a complete statement of all opinions expressed, and the basis and reasons for them, along with the data or other information considered by the witness in forming the opinion, exhibits to summarize or support the witness's opinion, the witness's qualifications.
 - iii. Trial preparation materials may be protected, particularly an attorney or representative's mental impressions, conclusions, opinions, or legal theories.
 1. written and oral communications from expert related to matters about which testimony will be offered (Intermedics Inc. v. Ventritex, 139 F.R.D 384 (N.D.Cal. 1991) **ONCE HIRED, EVERYTHING AN EXPERT WRITES OR RECEIVES IS DISCOVERABLE, INCLUDING EMAIL OR DRAFTS.** May be good habit to work on a single version of a single electronic document.
 2. attorney's opinions communicated to expert (Weil v. Long Island Savings Bank, 206 F.R.D. 38 (E.D.N.Y. 2001), but not those NOT shown to expert. (B.C.F. Oil Refining, Inc. v. Consol. Edison Co. of N.Y., 171 F.R.D. 57 (S.D.N.Y. 1997).
 3. Drafts. Relevant to show what expert considered, even if they included attorney comments. (Weil)
 4. Information which cannot be obtained through other means, and information is essential to case preparation, such as direct observation of expert. Hardships balanced.
 5. Usually protected: facts, opinions by expert not intended to testify. (Hartford v. Pure Air, 154 F.R.D. 202 (N.D.Ind.).

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2. Type of testimony

a. Expert

i. Scientific knowledge that will assist trier of fact to understand a fact or determine an issue

1. first, scientifically valid methodology/reasoning applies to facts in issue (*Daubert v. Merrell Dow*, 509 U.S. 579 (1993); *TMI* 911 F.Supp. 775 (M.D.Pa. 1996); Fed. Rule of Evidence 702; Ind. Rule of Evidence 702). Nonexclusive factors – theory or technique:

- a. can be, and has been, tested
- b. subject to peer review and publication
- c. accepted within relevant scientific community
- d. subject to standards for operation
- e. relationship to others established as reliable
- f. nonjudicial uses.
- g. “Replaced” former “Frye” test: general acceptance by scientific community.
- h. Indiana more lenient than Federal standard (*Kubisch v. State*, 784 N.E.2d 905 (Ind. 2003): A witness may be qualified as an expert by virtue of knowledge, skill, experience, training, or education, with only one characteristic needed.
- i. But, Indiana has limited this rationale to scientific expert testimony, declining to follow *Kumho* (*Carter v. State*, 766 N.E.2d 377 (Ind. 2002), *Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003)).

b. Skilled Witness

c. Fact

d. When presented

i. Direct examination

1. open ended questions
2. questions usually by own attorney
3. include a foundation for your qualifications

ii. cross examination

1. usually “yes” or “no” questions
2. questions usually from opposing attorney
3. usually intended to challenge your professional expertise, bias, ability to observe, impeach with contradictory prior statements.

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3. Tips

a. Do's:

- i. Be yourself as much as possible.
- ii. Prepare. Insist on preparation with your counsel, make sure counsel approves review material
- iii. arrive early to be on time
- iv. dress conservatively, NO HATS
- v. speak clearly, slowly, to the trier of fact
- vi. pause briefly before you answer a question to give your counsel time to object
- vii. if anyone objects before you answer, do not answer until the court tells you to answer
- viii. Tell the truth.
- ix. If you are guessing or estimating, say so.
- x. go over common definitions of technical terms and jargon
- xi. make sure you understand a question before you answer
- xii. ask for a break if you need one; after you have answered a pending question
- xiii. Listen to question, and answer the question you are asked
- xiv. Insist on noting if question cannot be answered as asked
- xv. Ask for question to be repeated or clarified if you need
- xvi. Ask for a moment of time if you need it
- xvii. Refer to documents if they are better source of fact
- xviii. Be rested, refreshed, relaxed.

b. Do not's:

- i. volunteer answers
- ii. guess or try to please
- iii. get emotional or argue with opposing counsel, court
- iv. make faces, gestures
- v. be too informal: gum, speech/swearing, posture
- vi. overthink a question
- vii. avoid "bad" facts. (Perfect cases don't get tried)
- viii. fall for "trick" questions
 1. "I don't know"
 2. "You did (or didn't) do ____"
 3. rapid-fire questions
 4. answer an unanswerable question
 5. friendliness/emotional style
 6. wear down
 7. "Are you being paid for your testimony? No, I am being paid for my time; the content of my testimony is not affected by compensation."